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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1478

PACIFIC GAS AND ELECTRIC COMPANY
and JAMES C. CARROLL,
Petitioners,

v.

DONALD WIDENER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT, DIVISION FOUR

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Petitioners, Pacific Gas and Electric Company ("PG-andE") and its employee James C. Carroll ("Carroll"), defendants in this First Amendment libel action, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal for the First Appellate District, Division Four ("Court of Appeal").

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeal, as modified, is reported at 75 Cal.App.3d 415, 142 Cal.Rptr. 304 (1977), and is reproduced as Appendix A (1a-29a) of this Petition. The California Supreme Court denied petitions for hearing by both parties without written opinion. The trial court's Order for Judgment Notwithstanding the Verdict ("Judgment NOV") and related orders, filed on January 9 and 12, 1976, are unreported and are reproduced as Appendix B. (30a-41a.)

JURISDICTION

The judgment of the Court of Appeal was entered on November 1, 1977. A timely petition for rehearing was denied on November 28, 1977. A copy of the unreported order modifying the opinion and denying rehearing is reproduced as Appendix C. (42a-43a.) A timely petition for hearing by the California Supreme Court was denied on January 19, 1978. A copy of the unreported order denying hearing is reproduced as Appendix D. (44a.) This Petition for a Writ of Certiorari is timely filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Did the Court of Appeal impermissibly transform the *St. Amant* v. *Thompson* subjective state of mind standard for proving constitutional malice with convincing clarity into an objective gross negligence standard when it permitted the plaintiff to show reckless disregard of the truth by cumulating independently colorless items of evidence? [This is a question related to the appropriate scope of discovery now before the Court in *Herbert* v. *Lando*, 568 F.2d 974 (2d Cir. 1977), *cert. granted*, 46 U.S.L.W. 3577 (March 20, 1978) (No. 77-1105).]

2. Did the Court of Appeal create an erroneous standard for public figure defamation actions by holding that a jury question on the issue of constitutional malice was presented by evidence of:

(a) the publisher's anger toward plaintiff;

(b) the publisher's desire to limit circulation of an arguably misleading television documentary about him;

(c) the seriousness of the charge;

(d) the publisher's negligent failure to investigate some of the available sources of information bearing on the truth of his written conclusions.

3. In the independent judicial review of the record in a First Amendment case, is it constitutionally permissible for an appellate court to view the evidence in the light most favorable to the plaintiff? [This is a question as to which the federal courts of appeals are in conflict.]

4. Does the First Amendment permit the cumulation of otherwise insufficient evidence to be combined with a judicial review which considers the evidence solely in the light most favorable to the plaintiff?

5. In a question expressly reserved in *New York Times Co.* v. *Sullivan,* may a plaintiff recover for defamation on the basis of minor inaccuracies in a publication whose charges are substantially correct?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States. The pertinent portions of these constitutional provisions are set forth in Appendix E hereto. (45a.)

STATEMENT OF CASE

Here the "media" in the person of Donald Widener is cast in the unaccustomed role of a defamation plaintiff, and a nuclear engineer and his employer appear in the equally unaccustomed role of First Amendment defendants.

Widener interviewed Petitioner Carroll during his production of a controversial television documentary on nuclear power. Before filming the interview, Widener asked Carroll about criticism of the early safety materials used in a PGandE nuclear power plant. Twice, Carroll offered to provide a detailed response to Widener's question. He declined to give a brief, superficial answer, believing it would be misleading. On both occasions, Widener advised Carroll that time constraints would not permit a detailed answer.

Widener then surprised Carroll by asking the same question during the filmed interview. For the third time, Carroll

explained that the question was too lengthy to answer within the time constraints as he understood them, and added:

> J. CARROLL: Do you want me to spend the ten minutes answering it right? I don't care. I will.

Widener declined:

> D. WIDENER: No, we won't—we don't have ten minutes and if you can't answer it in ten minutes, then—it can't be done.

Widener edited this interview so that the television audience never saw Carroll's offer to answer or Widener's refusal to listen. Widener's deletion of this portion of the interview was for the admitted purpose of leaving the impression that Carroll was unwilling to answer the question. This editing, he testified, was a deliberate exercise of his "journalistic judgment." Widener also added a narration by motion picture actor Jack Lemmon designed to further this impression:

> D. WIDENER: What was it exactly that the critics were talking about in your case?
>
> J. CARROLL: I don't think we ought to answer that, it's too lengthy a question.
>
> [Carroll's deleted offer to answer occurred at this point.]
>
> J. LEMMON: Long questions. Sometimes short answers. It's tough to get a matched set.
>
> The questions about nuclear power involve radiation, long-lasting wastes, and the possibility of a major accident. Long questions, indeed.

The film was broadcast over KNBC-TV in Los Angeles. Carroll first learned of the broadcast when a friend told him that he had been portrayed as evasive. PGandE and Carroll requested a copy of the film, but they were given only the written transcript of the program. Carroll read it and concluded that his interview had been distorted.

Carroll wrote a letter of complaint to KNBC-TV accusing Widener of misrepresentation. As a part of his accusation, Carroll attempted to reconstruct Widener's methods:

> Mr. Widener apparently taped our informal discussion prior to the filmed interview without my knowledge. Some carefully edited excerpts from the taped discussion are what appears above.

After litigation commenced, Petitioners subpoenaed a copy of the entire unedited Carroll interview (the "out-takes"). The out-takes revealed that Widener had misrepresented Carroll's answer by editing the actual filmed interview rather than by utilizing the informal pre-interview discussion as Carroll had supposed.

This factual inaccuracy was admitted, and the jury was instructed that they were to determine whether or not the charge of secret taping was published with knowing falsity or reckless disregard of the truth.[1] No evidence was introduced at trial that Petitioners knew any fact which contradicted or tended to disprove their belief that Carroll had been taped without his knowledge. Similarly, there was no evidence that anyone at PGandE considered Carroll unworthy of belief.

The jury rendered a verdict for Widener in the amount of $750,000 compensatory damages against PGandE and no compensatory damages against Carroll. The jury also awarded $7,000,000 in punitive damages against PGandE and $8,000 punitive damages against Carroll. The size of these awards suggests that this San Francisco jury was persuaded to punish the unpopular pro-nuclear views of a large, corporate utility.

The trial judge granted Petitioners a judgment NOV on the ground that no evidence had been introduced tending to

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[1]The rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), as applied to public figures, governed this case both at trial and on appeal through stipulation by Widener.

show that they knew their publication to be false or that they had serious doubts as to its accuracy. He also granted a precautionary new trial to take effect in the event that the judgment NOV was reversed on appeal.

Widener argued on appeal that a finding of reckless disregard of the truth should be permitted on the basis of evidence showing anger, improper motive, a serious charge, and an improper investigation. Although the Court of Appeal acknowledged the good faith belief test of *St. Amant* v. *Thompson,* 390 U.S. 727 (1968), it concluded that the cumulation of such evidence required reversal of the judgment NOV for the Petitioners. In doing so, it placed express reliance upon the following language from *Goldwater* v. *Ginzburg,* 414 F.2d 324, 342-43 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970):

> "[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, *by cumulation* and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. See, e.g., *Curtis Publishing Co.* v. *Butts, supra.*" [Emphasis added by the California Court of Appeal.]
>
> • • •
>
> "Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness." [Quoted in the *Widener* v. *PGandE* opinion at 18a.]

THE PRESENTATION OF THE FEDERAL QUESTIONS

QUESTIONS 1 and 2: Following the close of plaintiff's case in the trial court, Petitioners filed a motion for nonsuit on the ground that no evidence tending to establish

constitutional malice as defined by *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) had been introduced. The trial court denied the motion. Following the jury verdict, Petitioners moved for judgment NOV and a new trial on the same grounds. At all levels of the appellate process, Petitioners have argued that the evidence introduced by Widener was inappropriate to establish *New York Times* malice.

QUESTIONS 3 and 4: In reviewing and granting judgments NOV in First Amendment defamation cases, some federal courts of appeals undertake a *de novo* review of the evidence introduced at trial while others view the evidence in the light most favorable to the plaintiff. The split among the circuits as to the appropriate standard of review was presented to the trial court as part of Petitioners' motion for judgment NOV. Petitioners argued that they should prevail under either standard. The trial court granted judgment NOV under the stricter standard.

The same dichotomy with respect to the judicial role in deciding such motions was called to the attention of the Court of Appeal. The Court of Appeal refused to reweigh the evidence and applied the more limited standard of review in concluding that Widener's evidence presented a jury question.

QUESTION 5: Hitherto there has been no clear enunciation of a constitutional requirement that the substantial (as opposed to the literal) truth of a publication bars recovery in a public figure defamation action. Although this position was not raised specifically as a separate constitutional issue in the courts below, the issue of substantial truth under the state law was briefed and argued at all levels. None of the courts ruled on this issue though it was expressly presented to each of them.

Because of the important First Amendment values involved, it is appropriate for this Court now to consider the clearly delineated issue of substantial truth presented

in this case even though the argument was framed in terms of state law below. *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 82 (1967); *Founding Church of Scientology* v. *United States,* 409 F.2d 1146, 1164 n.2 (D.C. Cir. 1969).

REVIEW BY THIS COURT IS APPROPRIATE EVEN THOUGH PETITIONERS HAVE BEEN GRANTED A NEW TRIAL

Even though Petitioners have been granted a new trial, the judgment in this case is final under the rule of *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 483 (1975):

> ". . . if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation."

Here, the Court of Appeal set forth the standards under which the new trial will take place and has written the most detailed analysis on the admissibility and persuasiveness of certain categories of evidence in First Amendment defamation cases to be found in any reported California decision. Thus, in both the retrial of this action and in any other case relying on *Widener,* the constitutional values which form the basis of *St. Amant* v. *Thompson,* 390 U.S. 727 (1968) will be seriously eroded.

The importance of the rights protected by the First Amendment has frequently led this Court to review judgments which did not finally dispose of the cases involved. *Time, Inc.* v. *Pape,* 401 U.S. 279, 284 (1971); *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 246-47 (1974); *Mills* v. *Alabama,* 384 U.S. 214, 217-18 (1966). The principles enunciated in these cases and *Cox Broadcasting Corp.* v. *Cohn, supra,* make review appropriate in this case.

REASONS FOR GRANTING THE WRIT

1. The Unresolved Issues of Admissibility, Relevance and Weight of Evidence under *New York Times Co.* v. *Sullivan* as Presented by This Case Provide an Essential Perspective into the Problems Raised in *Herbert* v. *Lando.*

In the course of developing the *New York Times* privilege during the last 14 years, this Court has intentionally refrained from defining the minimum evidentiary showing which may establish reckless disregard of the truth. *St. Amant* v. *Thompson,* 390 U.S. 727, 730 (1968). Without direct guidance from this Court, the federal and state courts have created a patchwork of largely unarticulated evidentiary standards which reflect varying judgments as to the proper balance between the protection of legitimate reputational interests and the requirements of the First Amendment. This Court has recently decided to review the decision in *Herbert* v. *Lando,* 568 F.2d 974 (2d Cir. 1977), *cert. granted,* 46 U.S.L.W. 3577 (March 20, 1978) (No. 77-1105) which also touches on this important question.

The *Herbert* v. *Lando* decision represents the Second Circuit's attempt to regulate the evidence which may be utilized in establishing reckless disregard of the truth at the discovery stage. In reviewing *Herbert,* this Court will be considering the limits of permissible discovery in a First Amendment defamation case which will best serve the competing reputational and free speech interests. Whatever the outcome, this Court will be establishing one set of parameters concerning the proper role of certain types of evidence in such actions.

The scope of what must be properly discoverable can only be fully considered within the context of the standards governing the admissibility, relevance and weight to be accorded such evidence at the time of trial. By taking this natural opportunity to establish evidentiary standards, this Court may also address the recurring questions concerning evidence of ill will, motive, negligence and other similar

evidence which have been admitted for jury consideration. Relying on *Goldwater* v. *Ginzburg, supra,* the Court of Appeal held that a cumulation of such evidence presented a jury question as to "actual malice." Therefore, this case presents these evidentiary questions clearly and in the context of trial and post trial motions rather than at the discovery stage, as in *Herbert.*

A special vigilance in First Amendment cases will always be necessary to protect the rights of all speakers, particularly those holding unpopular views. However, the difficulty in public figure defamation actions could be minimized if the jury heard and considered only that evidence bearing directly upon the very narrow concepts of knowing falsity and reckless disregard of the truth as those terms have been defined by this Court. The current lack of such limitations has unnecessarily transformed the appellate courts into triers of fact.

As part of its independent review of the record, this Court has frequently considered evidence before it and determined that such evidence had no probative value in establishing constitutional malice.[2] Items of evidence which are entitled to no weight should not take on importance merely through cumulation. Since such evidence cannot lead to clear and convincing evidence of *New York Times* malice, it has no legitimate place in a First Amendment defamation

[2]The specific categories of evidence relied on by Widener have each been rejected as sufficient to establish constitutional malice: (1) hatred or ill will—*Garrison* v. *Louisiana,* 379 U.S. 64, 73-75 (1964); *Cantrell* v. *Forest City Publishing Co.,* 419 U.S. 245, 251-52 (1974); (2) motive for publication—*Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 82 (1967); (3) seriousness of charge—*St. Amant* v. *Thompson,* 390 U.S. 727, 733 (1968); and (4) negligent investigation—*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 287-88 (1964); *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 84-85 (1967). Although no opinion of this Court has expressly commented upon the cumulation of such evidence, many of the cases reviewed have contained evidence falling into two or more of these categories. For example, a serious charge is a typical component in most defamation cases.

action. Yet, evidence of hatred, ill will, motive and negligence form a major staple in First Amendment defamation trials. The announcement of an appropriate standard could forestall a continued focus on what are essentially irrelevant issues.

The opinion in this case represents the logical consequence of such a misplaced focus of attention. The *Widener* court's willingness to cumulate evidence of negligence, motive and ill will to permit an inference of "actual malice" results in a diluted definition of reckless disregard of the truth. If such a cumulation is permitted, the statement by the *Widener* court that "[r]ecklessness is, after all, only negligence raised to a higher power" will indeed become true.

A clear statement by this Court as to the evidentiary showing necessary to establish constitutional malice would have a number of salutary effects for the administration of justice. Discovery would be narrower in scope and less costly.[3] Trial results would be more predictable. Settlement negotiations could be pursued more meaningfully. The need for repeated appellate review would be reduced. Fewer groundless defamation actions would be filed, and the chilling effect on free speech which inevitably flows from costly litigation would be reduced. Most important, the likelihood that public figure defamation actions could be used as a device to punish unpopular opinion would be substantially eliminated.

This Court's decision in *Herbert* v. *Lando* concerning the proper scope of discovery will have far-reaching effects for future trials involving reckless disregard of the truth. The

[3]Because of the essentially unlimited scope of admissibility in First Amendment defamation cases, it is probably not uncommon to generate thousands of pages of court records and transcripts in the evaluation of comparatively limited publications. For example, in this case, over 1950 pages of Clerk's Transcript and over 2250 pages of Reporter's Transcript were created in the consideration of 27 words in Carroll's 1971 letter.

instant case provides a vehicle to consider these effects at the same time, thereby assuring uniformity of decision in this important area.

2. The Conflict Among the Circuits of the United States Courts of Appeals Regarding the Proper Rule for Review of the Evidence in a First Amendment Libel Case Should Be Resolved by This Court to Assure the Uniform Application of the First Amendment.

There is a conflict among the circuits concerning the correct function of the appellate courts in granting and reviewing judgments NOV in First Amendment cases. The Fifth, Eighth and District of Columbia Circuits have taken the view that the *New York Times* privilege requires an independent weighing of the evidence.[4] The Third and Ninth Circuits apply the standard applicable to nonconstitutional cases, viewing the evidence in the light most favorable to the jury's verdict.[5] The Court of Appeal in this case adopted the latter standard for the California state courts. Because this conflict is grounded in the proper interpretation of the First Amendment, its resolution is of equal importance to the state and federal courts.

Resolution of this conflict is important for the administration of justice. The courts have two opportunities to prevent the jury trial from becoming a device for the punishment of unpopular opinion. First, they may control the evidence upon which the jury's verdict may be based. Alternatively, they may require a system of *de novo* review of verdicts based upon a broader concept of admissibility.

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[4] *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 864 (5th Cir. 1970); *Baxter Berry* v. *National Broadcasting Company, Inc.*, 480 F.2d 428, 432 (8th Cir. 1973); *Wasserman* v. *Time, Inc.*, 424 F.2d 920, 922-23 (D.C. Cir.) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970).

[5] *Taggart* v. *Wadleigh-Maurice, Ltd.*, 489 F.2d 434, 439 (3d Cir. 1973), *cert. denied*, 417 U.S. 937 (1974); *Guam* v. *Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael*, 492 F.2d 438 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974).

Because of the close interrelation between a constitutional rule of evidence and the correct standard of trial court and appellate review, it is appropriate for this Court to consider these important issues in a case such as this one in which that interrelation is in clear focus.

The record in this case presents significant advantages for the consideration of the questions presented. Widener candidly categorized the nature of his evidence as tending to show anger, improper motive, seriousness of the charge and a failure of investigation. Secondly, the Court of Appeal concluded that by cumulating evidence of these propositions in the light most favorable to plaintiff, they would support an inference that the defendants "treated the question of truth or falsity as a matter of total indifference." (*Widener* v. *PGandE* opinion at 19a.) This holding puts the issue into particularly sharp focus.

The failure either to preclude this evidence at trial or, alternatively, to conduct a *de novo* review of the evidence on appeal will permit the imposition of defamation liability inconsistent with the dictates of *New York Times Co.* v. *Sullivan* and its progeny.

The failure to resolve this conflict among the circuits will inevitably result in the First Amendment meaning different things in different parts of the country. Such inconsistency is unacceptable, and this case presents the opportunity to resolve this conflict in the context of the important questions raised by *Herbert* v. *Lando* and this case.

3. This Court Should Announce a Constitutional Rule that the Substantial Truth of a Publication Precludes Defamation Liability.

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court concluded that the imposition of defamation liability for minor inaccuracies in a publication whose gist or sting was correct would present constitutional problems.

The question was expressly reserved in the following language:

> The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. (376 U.S. at 289.)

It is now beyond cavil that defamation liability for true statements cannot be imposed consistently with the First Amendment. As this Court recently noted in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 489-90 (1975):

> It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; and the message of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), and like cases is that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. [Footnote omitted.] [See also, *Time, Inc.* v. *Firestone,* 424 U.S. 448, 458 (1976).]

The question of whether a publication must be literally true in every respect or simply accurate in its essential thrust has yet to be resolved by this Court. This case squarely presents the issue reserved in *New York Times Co.* v. *Sullivan.*

Petitioners' letter accused Widener of bias, distortion and misrepresentation. The bias has been admitted by Widener. The distortion and misrepresentation are shown by Widener's admitted editing of Carroll's answer to further his own point of view rather than reporting the answer Carroll actually gave. Throughout this litigation, the only falsity claimed to exist in Carroll's letter is the error in his belief as to how Widener managed to distort the interview.

This record, therefore, presents a truthful charge of misrepresentation coupled with an inaccuracy as to the precise method by which it was accomplished.

To permit a citizen and his employer to face the prospect of a multi-million dollar verdict for such an inaccuracy would undeniably have a chilling effect on citizen participation in the ongoing dialogue which is fundamental to free government. Thus, the resolution of this important question will promote important First Amendment freedoms without any corresponding loss to legitimate reputational interests.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and judgment of the California Court of Appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE CALIFORNIA COURT OF APPEAL

[Civ. No. 40240. First Dist., Div. Four. Nov. 1, 1977.]

[As modified Nov. 28, 1977 on denial of petitions for rehearing.]

DONALD WIDENER, Plaintiff, Cross-defendant and Appellant, v. PACIFIC GAS & ELECTRIC COMPANY et al., Defendants, Cross-complainants and Appellants.

CHRISTIAN, J.—Donald Widener (hereinafter "appellant") appeals from a judgment notwithstanding the verdict and from an order granting a new trial after a jury had awarded him damages on his complaint for libel against Pacific Gas & Electric Company and its employee, James C. Carroll (hereinafter "respondents"). The verdict against PG&E was in the amount of $750,000 compensatory damages and $7,000,000 in punitive damages and against Carroll in the amount of $8,000 punitive damages. The jury also found in favor of Widener on a cross-complaint by Carroll.

The trial court rendered a combined "Order for Judgment Notwithstanding the Verdict, Order Conditionally Granting New Trial, and Order Granting New Trial on Cross-complaint." In its order, the trial court stated that the judgment n.o.v. was granted on the ground that appellant had failed to produce any evidence of "actual malice" as required under *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254 [11 L.Ed2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412] and that the evidence was thus insufficient to support a verdict in favor of the plaintiff. The trial court also stated that "In the event that, for any reason, the aforesaid order for judgment notwithstanding the verdict is reversed on appeal then the motion of defendants James C. Carroll and Pacific Gas & Electric Company, a corporation, for a new trial is hereby granted . . . ." The trial court specified, as the reason for its "Order Conditionally Granting new Trial," the same reason that it had given for granting a judgment n.o.v.—that plaintiff had failed to produce clear and convincing evidence of actual malice. The trial court also conditionally granted the defendants a new trial on the basis that the damages awarded by the jury were excessive. The trial court also granted defendant Carroll a new trial on his cross-complaint.

Widener appeals from the judgment notwithstanding the verdict and from the alternate order granting a new trial. Defendants PG&E and Carroll have taken a protective cross-appeal from the judgment entered on the jury's verdict in favor of plaintiff.

This libel action concerns a certain letter, written by respondent James C. Carroll, a supervising steam generation engineer employed by respondent Pacific Gas & Electric. The letter, dated July 13, 1971, was reviewed and revised several times by Carroll's superiors at PG&E, and was sent to Robert Howard, vice president of NBC and station manager of KNBC-TV in Los Angeles. In the letter, Carroll

attacked the content of "Powers That Be," a nuclear power documentary produced by KNBC, and charged appellant Donald Widener, the producer of the documentary, with a gross breach of journalistic ethics—secretly taping a preinterview discussion with Carroll, concerning the problem of faulty fuel rods, and splicing that discussion into the final film.

Appellant Widener was employed by KNBC as a documentary producer. Widener had received professional recognition for previous documentaries made for KNBC, and in 1971, had a one-year exclusive contract with NBC to produce three documentaries. One of these films, "Powers That Be," concerned the subject of nuclear power as a source of electrical energy. The research, writing, interviewing, and editing of the film were done by appellant pursuant to his contract with KNBC. "Powers That Be" was narrated by the well-known film personality, Jack Lemmon, and was broadcast in prime evening time over KNBC in Los Angeles on May 17, 1971. The point of view of the film was essentially anti-nuclear.

During the preparation of "Powers That Be," appellant filmed an interview with respondent James C. Carroll. The filming occurred in the control room of Humboldt Unit No. 3, a nuclear power plant operated by PG&E near the City of Eureka. The interview had been arranged by the public relations department of PG&E.

Respondent Carroll was aware that he was being filmed, and that his voice was being recorded on the NBC equipment, during the formal interview. During the filming, Carroll was seated facing Widener under bright lights especially set up for the interview. A member of the NBC camera crew fastened a sensitive Laveliere microphone on a cord around Carroll's neck. The filmed questioning was preceded by the sharp report of a clapboard held in front of

Carroll's face. The entire filmed interview with Carroll was approximately four minutes in length. A one-minute segment was used in the finished film. The film as broadcast lasts approximately 50 minutes.

Carroll did not see the KNBC broadcast of the film; he first learned of the broadcast from an acquaintance. Carroll was informed that he appeared "unable or not willing to answer a question that had been given to [him]."

On May 26, about a week after the broadcast, Frederick R. ("Fritz") Draeger, PG&E's "nuclear information specialist" and the employee who had made the arrangements for Widener's visit to the Humboldt Bay power plant, sent a memorandum to three of his superiors in the public relations department. The May 26th memo, which was sent to Larry R. McDonnell, head of the PG&E News Bureau, A. J. McCollum, head of public information, and Robert R. Gros, vice president of public relations, reported that a few of Draeger's friends who had seen the film "reacted violently" and that some friends of Dale Cook, Western States public relations officer for the United States Atomic Energy Commission, "tagged the documentary as 'smooth, professional and devastating.'" The May 26 memo states in full as follows:

"LRM/AJM/RRG:

" 'Powers that Be' was shown on KNBC Tuesday, May 18, 1971. A few of my friends saw it and reacted violently. I understand Jack Horton was concerned and has Bill Walker trying to develop a rebuttal program. From all I heard, we should go in and ask for equal time to respond to a hatchet job. Dale Cook reports that his friends tagged the documentary as 'smooth, professional and devastating.'

"From all I could glean as relates to our work at the Humboldt Bay Power Plant, Jim Adams wound up on the cutting room floor and J. Carroll's footage was so placed as to give the worst possible impression.

"KNBC plans to repeat the documentary in a few months. In six to nine months they will put it in the studio's circulating library. The film is currently being offered to affiliate stations.

"Dale Cook has promised to send me a review of it which appeared in the Los Angeles Times. The review is negative from our point of view.

"Widener's contract has not been renewed by KNBC so he is going independent. Thus, I have had difficulties in trying to get more information. At present there is only an original of the documentary and the studio refuses to let it out. However, to assuage my feelings, a transcript is being mailed to me today. It will be reproduced here and given broad circulation.

FRD

"P.S.—Just received transcript in mail—attached.

E. A. Boone

"JCCarroll
cc: JRAdams"

A copy of the memo was also sent to Carroll.

Sometime soon after May 26, Carroll asked Draeger to seek a copy of the film for review. Draeger had already requested the film on his own. KNBC declined to release its only copy but, as Draeger had reported in his May 26 memorandum, "to assuage my feelings, a transcript is being mailed to me today. It will be reproduced here and given broad circulation."

Draeger promptly circulated the transcript to "appropriate people in the company who might have an interest," but

not to Carroll. Carroll finally received a copy of the film transcript about a month later, on June 25. Upon reading it, Carroll became "upset" and "quite angry" at being portrayed as evasive. Carroll believed that the transcript erroneously and unfairly portrayed him as unwilling to answer a question concerning fuel cladding.* The film transcript read, in part, as follows:

"(JACK LEMMON): This reactor in northern California has been operating since the 1950s. But not without criticism. Such as faulty fuel rods, a problem since corrected. We asked P.G. and E.'s James C. Carroll about such criticisms.

"(DON WIDENER): Mr. Carroll, as you know, there have been published criticisms of the plant here for using improper construction materials in the beginning. Can you describe what that's all about?

"(JAMES C. CARROLL): Well this is analogous to a problem you have in your industry. There were criticisms of improper design and construction techniques in early color television sets that resulted in excessive radiation to people.

"(DON WIDENER): What was it exactly that the critics were talking about in your case?

"(JAMES C. CARROLL): I don't think we ought to answer that, it's too lengthy a question.[1]

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*Cladding is the metallic shielding around the radioactive fuel elements of a nuclear power plant. Where cracks develop in the fuel cladding material, radiation leaks into the environment.

[1]The "out-takes" show that the following occurred immediately after the exchange used in the finished film:

"D. WIDENER: I didn't. I didn't, never did hear what he said. What did you say? I never did hear that last part.

"J. CARROLL: It's too lengthy a question, I think, to answer.

"D. WIDENER: Oh, okay.

"J. CARROLL: Do you want me to spend the ten minutes answering it right? I don't care. I will.

"(JACK LEMMON): Long questions. Sometimes short answers. It's tough to get a matched set. The questions about nuclear power involve radiation, long-lasting wastes, and the possibility of a major accident. Long questions, indeed."

Carroll's memory was somewhat cloudy as to whether he had said the words shown in the transcript during the filming. In his testimony, Carroll did recall responding to Widener in a low voice during the filming, but "it was a mystery . . . how my . . . low voiced conversation could have ended up in the program." The following exchange occurred at trial:

"THE COURT: But at the time that you were writing this [letter] or reflecting on it at your home one evening, your recollection is that something that you had said had either been dubbed out or something that you had said at a prior time had been put in. Is that what you—what did you conclude preliminarily?

"D. WIDENER: No, we won't—we don't have ten minutes and if you—

[Third voice]: "Cut—

"D. WIDENER: can't answer it in ten minutes, then—

[Film ends, sound continues] [Blurred Film]

"D. WIDENER: —it can't be done."

Carroll believed that Widener's editing of the finished film unfairly portrayed him as evasive on the fuel cladding issue, since, as the "out-takes" show, Carroll had offered to answer Widener's question about "improper construction materials" during the formal interview if he could take ten minutes to respond. It was Widener's position that the answer used in the film fairly captured what Widener perceived as Carroll's evasive attitude. The fuel cladding or improper construction material issue was discussed preliminarily when the film crew arrived, and Carroll repeatedly stressed the need for "five to ten minutes to discuss it." At that time, Widener informed Carroll that he could not give Carroll 10 minutes because it was only a 50-minute film. Also during this preliminary discussion, Carroll "offered the opinion that [he] did not see how fuel cladding problems were really of much public interest" in view of the fact that "Humboldt Bay, as well as all other U.S. commercial power reactors, had always operated well below A.E.C. limits for both gaseous and liquid radioactive waste discharges."

"THE WITNESS: Well, there were two things that troubled me. One is my recollection of my response to that question was that it had been held in a low voice. And I could not understand how it could have ended up in the program.

"THE COURT: Is this at the actual filming?

"THE WITNESS: At the actual filming.

"THE COURT: And you couldn't understand [[what]]?*

"THE WITNESS: How that could have ended up in the program because of the high background noise in the control room and the rest of it.

"THE COURT: What ended up in the program, these words that I've just read?

"THE WITNESS: Yes.

"THE COURT: 'I don't think we ought to answer that. It's too lengthy a question'?

"THE WITNESS: Well, not those specific words, but words in response to that question. Because I recalled and my memo shows this, that when the question was asked I didn't know how to respond to it, and I dropped my voice to try to get Mr. Widener's attention."

Carroll testified that at the time he reviewed the film transcript and drafted the accusatory letter, he was certain that Widener had unfairly created the impression that Carroll had not wanted to answer the fuel cladding question; but his recollection was not clear as to specifically what he had said during the filmed interview.

Concluding that the answers that he had given during the Humboldt Bay interview had been misrepresented, Carroll decided to write a letter of complaint to KNBC-TV. Carroll

*Those items in double brackets are changes, approved by the Court of Appeal, which were not picked up when the opinion was first published in the Advance Sheets. When the opinion is published in the bound Official Reports, these changes will be incorporated.

submitted a draft of a letter to Fritz Draeger on June 30. A week later, Fritz Draeger submitted the draft, with his own minor changes, to his superiors in the public relations department and to P. A. Crane in the law department for their review. The draft letter was submitted by Draeger to his two superiors with the following cover memorandum, dated July 6, 1971:

"LRM/AJM:

"J. C. Carroll proposes to send the attached letter to:

> "Mr. Robert Howard, Station Manager
> KNBC Television
> 3000 Alemeida
> Burbank, California 90205

"I heartily concur that Jay should send this letter because he, along with the company, has been wronged by Widener's 'Powers That Be' documentary. *In fact, his accusation that his tape recorded words 'recorded without his knowing it' and dubbed in on the TV film, could be most effective in preventing this highly biased program from either ever appearing on the air again or, at least, causing the section referring to us to be wiped out.*

"This letter has been reviewed and approved by Paul Matthew; Bill Lindblad has reviewed it from an Engineering Department point of view. In fact, he suggests that a copy be sent to Spiro Agnew (in jest, I assume).

"By copy of this letter to P. A. Crane, I am asking for legal review and opinion.

"May I have your comment so Jay can receive any further counsel that is needed.

FRD

"Enclosure

cc: P. A. Crane, Law Department
J. C. Carroll, Steam Engineering
H. L. McMasters, Advertising-Publicity"

[[emphasis added]]

On July 7, Draeger returned a marked-up draft to Carroll with a note informing Carroll that "Enclosed are comments from various people who have reviewed your proposed letter to Mr. Robert Howard, Station Manager, KNBC Television, Burbank." Draeger's note also pointed out the comment from Phil Crane in PG&E's law department that ". . . you should clarify more exactly what you consider to be the main point of contention—that a tape recorded bit was inserted into a film portion of the interview."

On July 13, the final letter, which reflected the editorial suggestions that Draeger had collected, was mailed to Robert Howard at the KNBC studios in Burbank. The three-page letter bitterly denounced the bias of the documentary produced by appellant for KNBC, characterizing the script as "replete with halftruths, innuendos, and worse." In the letter, Carroll charged that: "Mr. Widener apparently taped our informal discussion prior to the filmed interview without my knowledge. Some carefully edited excerpts from the taped discussion are what appears [in the film transcript]." Carroll conceded, at trial, that the charge of surreptitious taping and dubbing was false:

"Q. And as you sit here today, Mr. Carroll, is there any doubt in your mind that the words His Honor just read from the transcript, the words I just read that are transcription from this film we just saw a moment ago were uttered by you when you were on camera during the interview with Mr. Widener?

"A. No, there isn't.

"Q. There's no doubt in your mind now, is there?

"A. No, there isn't. Not at this time.

"Q. Those words were [[not]] taped off camera secretly without your knowledge, were they?

"A. No, they were not."

Carbon copies of the July 13 letter from Carroll to Robert Howard were sent to appellant Widener, Jack Lemmon and Congressmen Chet Holifield and Craig Hosmer (two Southern California congressmen who were members of the Joint Committee on Atomic Energy). Copies of the letter were also sent to a nuclear information specialist employed by the Southern California Edison Company, to Underwood and Jordan, a New York public relations firm, to the manager of media relations for the Atomic Industrial Forum, and to the California Nuclear Liaison Committee.

On July 28, 1971, additional copies of Carroll's July 13 letter were sent by Ralph B. Dewey, PG&E's Washington representative, to several members of Congress and to members of the Federal Communications Commission. As the jury was instructed, the letters sent to members of Congress and officials of the Federal Communications Commission were "absolutely privileged and no liability of the [respondents] could result therefrom." The letters were apparently received only for the purpose of showing the general context of other pertinent communications.

Everyone connected with the Carroll letter recognized that in the commercial television industry the charge of surreptitious taping and dubbing was a grave accusation that could destroy the reputation of a person in that industry. Draeger and Dewey knew that the charge was "very serious." Robert R. Gros, vice president of public relations for PG&E, testified that the charge was "quite serious," "very unethical journalism," that he would not permit such a practice in the production of PG&E's own films, and that if any-

one under his supervision had engaged in such conduct "I would have fired him." Jack Lemmon characterized the accusation as "deadly" and "the kiss of death." Reece Halsey, an expert with 32 years' experience as an agent for television writers and producers, testified that the charge would destroy a producer's reputation if it "received any spreading around in any way." Robert Howard, station manager for KNBC-TV in Los Angeles indicated that proof of such an allegation would be cause for immediate dismissal from NBC.

On August 13, 1971, Robert Howard, NBC vice president and general manager of KNBC, replied to the July 13 letter he had received from Carroll. Howard stated in his letter that the charge of surreptitious taping and dubbing had been investigated by KNBC and found to be without basis in fact. Howard's reply concluded by inviting Carroll to appear on one of the station's interview programs.

On August 24, 1971, Carroll responded to Howard's reply letter, declining the invitation to appear on a subsequent program. Carroll's August 24 letter states, in part:

"Dear Mr. Howard:

"This is in response to your August 13 reply to my July 13 letter regarding the program 'Powers That Be' produced for KNBC by Mr. Don Widener. I have reviewed the events prior to and during the actual filming of my interview with Mr. Widener on February 10 with a number of P.G. and E. people who were present. The informal discussion between Mr. Widener and me which took place prior to the actual filming occured while the camera crew were setting up their equipment and adjusting lighting and audio levels. Our collective recollection is that some or all of the material which was ultimately used in the program was recorded during this period.

"Even accepting your explanation that the filmed interview was a misunderstanding between Mr. Widener and me

on what constituted the actual interview as contrasted to our informal discussion, I must continue to voice my same complaint about the manner in which the material from this interview was used in the program. Mr. Widener knows full well that I did not decline to discuss the subject of the fuel difficulties which occurred early in the life of the Humboldt Plant as the program implies. . . .

"Finally, I have reviewed your series of KNBC editorials of August 3, 4 and 5, and am pleased to note that KNBC now advocates that 'in spite of the risks, nuclear power development should continue in Southern California.' *I take this to mean that you have no future plans for showing 'Powers That Be' or for making it available to organizations which do not share your views and mine about the important role nuclear power must play in meeting our future electrical energy requirements. If this proves to be the case,* there is obviously no purpose in my pursuing this matter further. (Italics added.)"

In Washington, Ralph P. Dewey received several replies to his July 28 letters. Dewey also conferred by telephone with Nicholas Zapple, staff counsel of the Senate Committee on Commerce, who indicated that, while the charge of surreptitious taping appeared to be untrue, NBC was "deeply concerned" over the entire matter. Following this phone conversation with Zapple, Dewey scribbled a private memorandum on the reply correspondence as follows: "Called him [Zapple] 10 a.m. 9/13. He reiterated his own view that Carroll was 'off base.' I said—the case rests; *but the fact that NBC is upset at our aggressive approach is just what we wanted.*" (Italics added.)

On August 12, 1971, an NBC memo entitled "Interdepartment Correspondence," from J. Marshall Wellborn to Corydon B. Dunham, stated in part as follows:

Bob Howard telephoned today to inform me that a press relations officer at PG&E had telephoned him to discuss J. C. Carroll's letter.

Essentially, PG&E wanted to make it clear that Mr. Carroll had written the letter on his own initiative and that his opinion did not express the views of PG&E. He stated that neither he nor Mr. Carroll had actually seen the program POWERS THAT BE, and that Mr. Carroll had made his judgments concerning the programs solely on the basis of comments made by others concerning the program and on the basis of scripts that KNBC had provided to him.

Appellant contends that the trial court erred in granting respondents' motion for a judgment notwithstanding the verdict, on the ground that appellant had failed to produce sufficient evidence that the defamatory statements were made with "actual malice," as required by *New York Times Co.* v. *Sullivan, supra,* 376 U.S. 254. In *New York Times,* the United States Supreme Court held that, in order for a public official to be able to recover for defamation, the First Amendment required the public official to prove, with convincing clarity, the defendant's "actual malice," at the time of the publication. "Actual malice" can be shown by proving either that the defendant knew of the falsity of the statement or that the defendant uttered the statement in reckless disregard for the truth. (*New York Times Co.* v. *Sullivan, supra,* 376 U.S. at pp. 279-280 [11 L.Ed.2d at pp. 706-707].) The *New York Times* rule also applies to plaintiffs who are "public figures." (*Gertz* v. *Robert Welch, Inc.* (1974) 418 U.S. 323, 335-336, 342-343 [41 L.Ed.2d 789, 803, 806-807, 94 S.Ct. 2997]; *Curtis Publishing Co.* v. *Butts* (1967) 388 U.S. 130, 154-155 [18 L.Ed.2d 1094, 1110-1111, 87 S.Ct. 1975] [plurality op. of Harlan, J.], reh. den. 389 U.S. 889 [19 L.Ed.2d 197, 88 S.Ct. 11]; *Carson* v. *Allied News Co.* (7th Cir. 1976) 529 F.2d 206, 209.) "Public figures" are those who "have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures

have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." (*Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at p. 345 [41 L.Ed.2d at p. 808]; see *Time, Inc.* v. *Firestone* (1976) 424 U.S. 448, 453-455 [47 L.Ed.2d 154, 162-163, 96 S.Ct. 958].) Thus, a plaintiff may be a "public figure" for all purposes or for a "limited range of issues." (See *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at p. 351 [41 L.Ed.2d at p. 812].) Where a *private individual* has been defamed, actual malice need not be shown in order to recover for defamation. Only negligence as to the statement's truth or falsity need be shown when resolving the libel claims of private individuals. (*Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. 323.) However, even where the plaintiff is a private individual, actual malice—i.e., knowledge of falsity or reckless disregard for the truth—must be shown in order to recover punitive damages. (*Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at pp. 346-349 [41 L.Ed.2d at pp. 809-811].)

Appellant contended below that he was not a public figure. However, during the settlement of jury instructions, appellant stipulated that the *New York Times* standard would be applied, and the jury was so instructed. Therefore, the *New York Times* rule will be applied here. (See *Fopay* v. *Noveroske* (1975) 31 Ill.App.3d 182 [334 N.E.2d 79, 88]; see also *Davis* v. *Schuchat* (D.C.Cir. 1975) 510 F.2d 731 [166 App.D.C. 351].)

Actual malice must be proved with convincing clarity. (*New York Times Co.* v. *Sullivan, supra,* 376 U.S. 254, 285-286 [11 L.Ed.2d 686, 709-710]; *Goldwater v. Ginzburg* (2d Cir. 1969) 414 F.2d 324, 341, cert. den., 396 U.S. 1049 [24 L.Ed.2d 695, 90 S.Ct. 701]; see also *Field Research Corp.* v. *Patrick* (1973) 30 Cal.App.3d 603, 608 [106 Cal.Rptr. 473], cert. den., 414 U.S. 922 [38 L.Ed.2d 157, 94 S.Ct. 218].) Whether there was "actual malice," as required by the

New York Times standard, is, of course, a question of fact for the jury. (See *St. Amant* v. *Thompson* (1968) 390 U.S. 727 [20 L.Ed.2d 262, 88 S.Ct. 1323]; *Time Inc.* v. *Hill* (1967) 385 U.S. 374, 394 [17 L.Ed.2d 456, 470, 87 S.Ct. 534].) This court has a duty to closely examine the record to determine whether it could constitutionally support a judgment in favor of the plaintiff (see *New York Times Co.* v. *Sullivan, supra,* 376 U.S. 254, 285 [11 L.Ed.2d 686, 709]), but this does not involve a de novo review of the trial court proceedings wherein the jury's verdict is entitled to no weight. (See *Alioto* v. *Cowles Communications, Inc.* (9th Cir. 1975) 519 F.2d 777, 780, cert. den., 423 U.S. 930 [46 L.Ed.2d 259, 96 S.Ct. 280]; *Guam Federation of Teachers, Loc. 1581 A.F.T.* v. *Ysrael* (9th Cir. 1974) 492 F.2d 438, 441, cert. den., 419 U.S. 872 [42 L.Ed.2d 111, 95 S.Ct. 132]; *Fopay* v. *Noveroske, supra,* 334 N.E.2d 79, 87.)

In the present case, appellant was required to prove by clear and convincing evidence that respondents made the defamatory statement in the July 13 letter with knowledge that the accusation of surreptitious taping was false, or with reckless disregard of whether it was false or not. (*New York Times Co.* v. *Sullivan, supra,* 376 U.S. 254, 280 [11 L.Ed.2d 686, 706-707].) Reckless disregard "cannot be fully encompassed in one infallible definition"; rather, "its outer limits [must] be marked out through case-by-case adjudication, . . ." (*St. Amant* v. *Thompson, supra,* 390 U.S. 727, 730 [20 L.Ed.2d 262, 267].) It is clear, however, that it involves a stringent and subjective standard. It is not measured by whether a reasonably prudent person would have published, or would have investigated before publishing. Rather, there must be sufficient evidence to permit an inference that the defendant must have, in fact, subjectively entertained serious doubts as to the truth of his statement. (*St. Amant* v. *Thompson, supra,* 390 U.S. at p. 731 [20 L.Ed.2d at p. 267]; *Alioto* v. *Cowles Communications, Inc., supra,* 519 F.2d 777, 779; *Montandon* v. *Triangle*

Publications, Inc. (1975) 45 Cal.App.3d 938, 947 [120 Cal. Rptr. 186], cert. den., 423 U.S. 893 [46 L.Ed.2d 126, 96 S.Ct. 193].) Actual malice, under *New York Times,* concentrates on the defendant's attitude toward the truth or falsity of the material published, and does not focus on the defendant's attitude toward the plaintiff. (*Cantrell* v. *Forest City Publishing Co.* (1974) 419 U.S. 245, 251-252 [42 L.Ed. 2d 419, 426, 95 S.Ct. 465]; *Carson* v. *Allied News Co., supra,* 529 F.2d 206, 214.) Where the defamatory statements made by the defendant do not involve an element of "hot news" and the need for expeditious release is not present, reckless disregard for the truth may be evidenced in part by failure to investigate thoroughly and verify the facts. This is particularly true where the substance of the defamatory statements, which the defendant was publishing, were such that substantial danger to reputation was apparent. (*Curtis Publishing Co.* v. *Butts, supra,* 388 U.S. 130; *Goldwater* v. *Ginzburg, supra,* 414 F.2d 324, 339; *Carson* v. *Allied News Co., supra,* 529 F.2d 206, 211; *Fopay* v. *Noveroske, supra,* 334 N.E.2d 79, 88.) "[W]hen the story is not 'hot news,' . . . the investigation must be more thorough, and 'actual malice may be inferred when the investigation . . . was grossly inadequate in the circumstances.'" (*Vandenburg* v. *Newsweek, Inc.* (5th Cir. 1975) 507 F.2d 1024, 1026.) "[E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, *by cumulation* and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. See, e.g., Curtis Publishing Co. v. Butts, *supra.*" (*Goldwater* v. *Ginzburg, supra,* 414 F.2d 324, 342; italics added.) In *Curtis Publishing Co.,* the Supreme Court found that a muckraking intent, the absence of any "hot news" element, and an inadequate investigation, were all significant factors in determining actual malice.

The mere profession of a defendant that he believed in good faith that his statements were true does not automati-

cally entitle him to a verdict in his favor. (*St. Amant* v. *Thompson, supra,* 390 U.S. at pp. 732-733 [20 L.Ed.2d at pp. 267-268].) "As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of fact is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia." (*Herbert* v. *Lando* (S.D.N.Y. 1977) 73 F.R.D. 387, 395.) As the court stated in *Goldwater* v. *Ginzburg, supra,* 414 F.2d 324, at page 343: "Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court. See St. Amant v. Thompson, *supra,* 390 U.S. at 732-733, 88 S.Ct. 1323."

An independent review of the evidence reveals ample evidence from which the jury might infer that respondent PG&E acted with reckless indifference to the truth or falsity of the serious charge it made against Widener. There was no "hot news" element here. The PG&E executives, who participated in the drafting and review of the July 13 corporate letter, had cause seriously to question the veracity of their sole source, Carroll. Every one of them was aware of the extreme gravity of the charge of surreptitious tampering, of Carroll's anger, and of the fact that five months had elapsed since the filming session. None of them (nor Carroll) had viewed the film, in which Carroll's words are clearly synchronized with his lip movements and he appears to be looking directly at the camera. None checked into the technical feasibility of the charged tampering. Robert Gros, vice-president of public relations, testified as follows: "Q. Now, that's a very unusual event, is it not, the secret or clandestine taping of somebody's words and

putting them in a finished film that goes out over broadcast? A. So unusual I've never heard of it." However, none of them questioned Carroll about the charge. Respondent PG&E was very much aware of the possible resulting harm; the seriousness of the charge it was making called for a thorough investigation, but the record reveals that little or no investigation was conducted. The record also indicates that respondent intensely desired the suppression of the anti-nuclear power film, which it viewed as "smooth, professional and devastating." Thus the jury, in applying the "clear and convincing evidence" test, might have inferred that respondent's motive to suppress the film so overwhelmed its attention that all of its agents, who were in a position to control sending the letter, treated the question of truth or falsity as a matter of total indifference. (See *Alioto* v. *Cowles Communications, Inc., supra,* [[5]]19 F.2d 777, 780.)

Appellant contends that there was also sufficient evidence from which the jury might have found that respondent Carroll made the surreptitious-taping charge with knowledge of its falsity, or in reckless disregard for whether it was accurate or not. Carroll testified that he did not remember saying, on camera, "the things that the transcript shows [him] as saying." Matters of credibility, however, are for the jury. The jury was not required to believe Carroll's testimony that, at the time of the July 13 letter, he did not believe that he had said those words. There was much evidence that Carroll was extremely "upset and angry" at being portrayed as evasive.[2] Several months had elapsed

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[2]Carroll's February 14 notes on the February 10 interview lend some support to Widener's contention that Carroll was being evasive. Carroll's notes acknowledged that ". . . Widener apparently realized that . . . Carroll would probably not respond to questions which [Carroll] considered improper . . . ." Also, Draeger's written comments on an August 17 memo from Gros stated in part: ". . . Widener *knew* Jay [Carroll] wouldn't answer the question as result of warm-up conversation."

since the filming and he could not remember specifically what he had said in the interview; his own notes of the February 10 interview indicated to him that at least some conversation concerning fuel cladding was held during the filmed interview. Carroll also greatly desired to suppress the film. There was sufficient evidence from which the jury could have found that Carroll knew the charge was false, or was recklessly indifferent as to whether his statement was accurate or not. The trial court therefore erred when it granted the motion for a judgment notwithstanding the verdict on the ground that appellant had failed to produce sufficient evidence of actual malice to support the jury's verdict.

Appellant contends that the trial court was without power to make an order that it would grant a new trial if its order for judgment notwithstanding the verdict was reversed on appeal. Appellant is correct in his contention that the trial court's order conditionally granting motion for a new trial was technically defective. The trial court's order states: "In the event that, for any reason, the aforesaid order for judgment notwithstanding the verdict is reversed on appeal then the motion of defendants . . . for a new trial is hereby granted . . . ." Under section 629 of the Code of Civil Procedure, the trial court has the authority to simultaneously grant both a motion for judgment notwithstanding the verdict and an alternative motion for a new trial.[3] If both motions are granted by the trial court, the statute provides that the order alternatively granting a new trial will come into effect only if the order granting a judgment

[3]Code of Civil Procedure section 629 provides, in part: "If the court grants the motion for judgment notwithstanding the verdict or of its own motion directs the entry of judgment notwithstanding the verdict and likewise grants the motion for a new trial, the order granting the new trial shall be effective only if, on appeal, the judgment notwithstanding the verdict is reversed, and the order granting a new trial is not appealed from or, if appealed from, is affirmed."

notwithstanding the verdict is reversed on appeal, and the order granting a new trial, if appealed from, is affirmed. The "Conditional New Trial Order," in this case, appears to be an announcement that the trial court would grant a motion for new trial sometime in the future in the event its prior order were to be reversed. Such an act would be in excess of the trial court's jurisdiction (see Code Civ. Proc., § 660;[4] see also 4 Witkin, Cal. Procedure (2d ed. 1971) § 381, p. 3172). However, the language of the order can also be read as simply granting an alternative order for a new trial; it will be so construed, to give effect to the court's manifest intention.

Appellant contends that the order granting respondents a new trial must be reversed, because (1) the specifications of reasons in the trial court's order are legally inadequate, and (2) there is "no substantial basis in the record" supporting the trial court's reasons (see Code Civ. Proc., § 657).

When a new trial is granted, section 657 of the Code of Civil Procedure requires that the trial court specify the ground or grounds upon which the new trial is granted and the court's reason or reasons for granting the new trial upon each ground stated. (See *Scala* v. *Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 363 [90 Cal.Rptr. 592, 475 P.2d 864]; *Mercer* v. *Perez* (1968) 68 Cal.2d 104, 115-116 [65 Cal. Rptr. 315, 436 P.2d 315].) In *Mercer* v. *Perez, supra,* the California Supreme Court "explained that the requirement

[4]Code of Civil Procedure section 660 provides, in part: "Except as otherwise provided in Section 12a of this code, the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial."

of a specification of reasons served the two-fold purpose of encouraging careful deliberation by the trial court before ruling on a motion for new trial, and of making a record sufficiently precise to permit meaningful appellate review." (*Scala* v. *Jerry Witt & Sons, Inc., supra,* 3 Cal.3d at p. 363; see *Mercer* v. *Perez, supra,* 68 Cal.2d at pp. 112-115; see also *Dizon* v. *Pope* (1974) 44 Cal.App.3d 146, 148 [118 Cal.Rptr. 465].)[5] A specification of reasons, phrased in terms of "ultimate fact," fails to comply with section 657 of the Code of Civil Procedure (*Scala* v. *Jerry Witt & Sons, Inc., supra,* 3 Cal.3d 359, 370). The trial court's "reason" must do more than simply reiterate the ground of the ruling itself (*Scala* v. *Jerry Witt & Sons, Inc., supra,* 3 Cal.3d at pp. 367, 370). In specifying its reasons for granting the motion for a new trial, the trial court must briefly identify the portion of the record which convinces the court that the jury clearly should have reached a different verdict. (*Scala* v. *Jerry Witt & Sons, Inc., supra,* 3 Cal.3d at p. 367; *Mercer* v. *Perez, supra,* 68 Cal.2d 104, 116; *Oberstein* v. *Bisset* (1976) 55 Cal.App.3d 184, 187 [127 Cal.Rptr. 413].) Where the specification of reasons in the order granting a new trial is inadequate to comply with the mandate of section 657 of the Code of Civil Procedure, as construed in *Mercer* v. *Perez, supra,* 68 Cal.2d 104, the new trial order must be reversed, and the judgment will be automatically reinstated (see *Scala* v. *Jerry Witt & Sons, Inc., supra,* 3 Cal.3d 359; *Oberstein* v. *Bisset, supra,* 55 Cal.App.3d 184, 190). Where the trial court's specification of reasons adequately complies with the requirements of section 657, the court's new trial order will be upheld on appeal if

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[5]Since orders granting motions for new trial are infrequently reversed, "it is essential that they be the product of a mature and careful reflection on the part of the judge. Society has a manifest interest in avoiding needless retrials . . . ." (*Mercer* v. *Perez, supra,* 68 Cal.2d at p. 113.)

there is any substantial evidence in the record to support the specified reasons (see *Dizon* v. *Pope, supra,* 44 Cal.App. 3d 146, 148).

The trial court conditionally granted the new trial order on two grounds: insufficiency of the evidence on the "actual malice" issue to justify the verdict, and excessive damages. The adequacy of the "insufficiency of the evidence" ground will be examined first.

Insufficiency of the Evidence

The order adequately sets forth the ground (insufficiency of the evidence) upon which the trial court relied in granting respondents a new trial but, as appellant argues, it does not contain the adequate specification of reasons mandated by section 657 of the Code of Civil Procedure. The trial court's stated "reason" is little more than a reiteration of the ground of the ruling itself; it is wholly conclusory and stated in terms of "ultimate fact." The trial court fails to cite the respects in which the plaintiff's *evidence* is legally inadequate. There is no identification of the deficiencies which the trial court found in "the evidence," and in "the record," as opposed to merely in "the issues." (*Scala* v. *Jerry Witt & Sons, Inc., supra,* 3 Cal.3d 359, 366, 367, 369-370; *Oberstein* v. *Bisset, supra,* 55 Cal.App.3d 184, 187; *Previte* v. *Lincolnwood, Inc.* (1975) 48 Cal.App.3d 976, 987 [122 Cal.Rptr. 194].) The specification of reasons must briefly identify the evidence or portion of the record which convinces the judge that the jury clearly should have reached a different verdict (*Oberstein* v. *Bisset, supra,* 55 Cal.App.3d 184, 187).

However, in response to a letter from defense counsel suggesting an amplification of the specification of reasons and citing the applicable case law in this area, the trial court, on January 12, 1976, filed an "Amplification of Or-

ders of January 9, 1976," setting forth a specification of reasons for granting the motion for a new trial. This procedure was proper (see *LaManna* v. *Stewart* (1975) 13 Cal.3d 413, 418, 424 [118 Cal.Rptr. 761, 530 P.2d 1073]; *Mercer* v. *Perez, supra,* 68 Cal.2d 104, 123-124 at fn. 8; *Oberstein* v. *Bisset, supra,* 55 Cal.App.3d 184, 189).

The specification contained in the "Amplification" adequately set forth the trial court's reasons for granting a new trial on the ground of insufficiency of the evidence with regard to respondent Carroll. However, no specification of reasons is given as to why "the evidence" was insufficient to support the jury's determination that "actual malice" (i.e., knowledge of falsity or reckless disregard for truth or falsity) was established with regard to respondent PG&E. Inasmuch as no reasons were specified with regard to respondent PG&E, the order granting respondent PG&E's motion for a new trial cannot be sustained on the ground of insufficiency of the evidence (see *LaManna* v. *Stewart, supra,* 13 Cal.3d at p. 425).

The question remains whether the order granting a new trial can be sustained on another basis. Appellant contends that, even if the specification of reasons with regard to respondent Carroll was adequate, there is "no substantial basis in the record" (Code Civ. Proc., § 657) supporting the reasons which were specified by the trial court. Therefore, appellant contends, the trial court abused its discretion in granting Carroll a new trial on the ground of insufficiency of the evidence to justify the verdict. The trial court's amplification order pointed to the following evidence: The evidence shows, and the court finds, that before writing the letter of complaint dated July 13, 1971 Carroll recalled the subject matter of the February 10, 1971 interview with Widener, both before and during the filming of "Powers That Be." He also reviewed a transcript received from KNBC-TV. He reviewed a memorandum he had made

on February 14, 1971 relating to the February 10 interview with Widener. Carroll also talked to Draeger, Ramsey and Weeks, fellow Pacific Gas and Electric Company employees. Carroll let them see the letter and check its contents for accuracy before the letter was mailed.

Appellant correctly argues that the record contains contradictory evidence on this matter. However, the court stated in *Dietrich* v. *Litton Industries, Inc.* (1970) 12 Cal. App.3d 704, 717 [90 Cal.Rptr. 856]: "In passing upon a motion for a new trial made upon the ground of insufficiency of the evidence the trial judge is required to weigh the evidence; and in so doing he may disbelieve witnesses and draw inferences contrary to those supporting the verdict. When the motion is granted upon this ground the appellate court may reverse only when, as a matter of law, there is no substantial evidence to support a contrary judgment. (*Mercer* v. *Perez, supra,* at p. 112.)" Section 657 of the Code of Civil Procedure "*significantly* limits the scope of appellate authority to review new trial orders. . . ." (*Jones* v. *Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710 [106 Cal.Rptr. 28, 505 P.2d 220]; italics added.) An order granting a new trial on the ground of insufficiency of the evidence may only be reversed on appeal where there is no substantial evidence to support the trial court's specified reason (*Hale* v. *Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681, 693 [117 Cal.Rptr. 146]). As the court stated in *Jones* v. *Citrus Motors Ontario, Inc., supra,* 8 Cal.3d 706, 710: ". . . [T]he trial court is required to state in its order the theory under which it concludes the jury should have returned a verdict for the moving party, and the order must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on that theory." (See *Dietrich* v. *Litton Industries, Inc., supra,* 12 Cal.App.3d 704, 717.) It cannot be said, as a mat-

ter of law, that there is no substantial evidence to support a contrary judgment. Therefore the order granting respondent Carroll a new trial is to be upheld.

Excessive Damages

Turning to the second ground (i.e., excessive damages) on which the new trial order was based, appellant contends: (1) that there was an inadequate specification of reasons for the court's conclusion that there was no evidence of damages, and (2) even if the specification of reasons to support the ground of excessive damages was formally sufficient under section 657, the trial court's conclusion is not supported by substantial evidence in the record.

The specification of reasons for granting the motion on the ground of excessive damages was as follows:

"In this action the jury awarded plaintiff a verdict of $750,000 general damages and $7,000,000 punitive damages.

"Except for copies sent to members of Congress, which were absolutely privileged, only the original and four copies of the July 13, 1971 letter were mailed and to be considered by the jury. There is no evidence that any of the recipients of said letter republished same. The original of the letter was sent to KNBC-TV, Los Angeles. Mr. Howard, its General Manager, testified that the letter did not affect plaintiff's relationship with National Broadcasting Company. None of the other recipients of the letter was connected in any way with the television industry.

"Plaintiff has failed to establish by a preponderance of the evidence any causal connection between the publication of the letter and his fluctuating income.

"The court is convinced that the award in this case was based on factors other than on any evidence which would indicate general or punitive damages sustained by plaintiff proximately resulting from said published letter.

"After weighing the evidence the court is convinced from the entire record, including all reasonable inferences to be drawn therefrom, that plaintiff has not suffered any loss or damage, general or punitive, by reason of the publication of the aforesaid letter."

With regard to the excessive damages ground, the form of the January 9 order adequately complies with the requirements of section 657, that the order specify the ground or grounds upon which it is granted and the reasons for granting the new trial on each of the grounds stated. (See *Mercer* v. *Perez, supra,* 68 Cal.2d 104, 109-116.)

However, appellant contends that the trial court's conclusion that there was no evidence that appellant was damaged by the defamatory statement is not sufficiently supported by the record, and thus the trial court abused its discretion in granting the motion for a new trial. According to the January 9 order, the trial court based its conclusion that appellant was not damaged by the libel on the narrow circulation of the libelous letter and on the fact that Robert Howard, general manager of KNBC, testified that the letter did not affect appellant's relationship with the National Broadcasting Company. The order also asserts that, aside from KNBC, "None of the other recipients of the letter was connected in any way with the television industry." Appellant points out that the letter was sent to Underwood and Jordan, a nationally known advertising firm concerned with media advertising for the utility industry, and contends that the PG&E public relations department sent the letter there in order to assure wide circulation to the television industry. Appellant argues that Reece Halsey testified that a producer's successes make up the principal promotional material used by agents seeking work for writers and producers in the television industry. Each of appellant's films had been important in advancing his career. Appellant contends that NBC's plans in May 1971 to rebroadcast

"Powers That Be" and make it available to other stations were cancelled because of the controversy arising from the July 13 letter, and thus the libel deprived appellant of the benefit of exposure of his last film produced by KNBC. Appellant also argues that the jury could properly have inferred that, coming on the heels of respondents' surreptitious-taping charge, appellant's inability to find significant work in the profession where he was acknowledged to be among the best, was a proximate result of the libel. Additionally, appellant contends that the trial court's order fails to mention the evidence in the record of general damages for "personal humiliation, and mental anguish and suffering." (*Time, Inc.* v. *Firestone, supra,* 424 U.S. 448, 460-461 [47 L.Ed.2d 154, 166-167]; *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. 323, 350 [41 L.Ed. 2d 789, 811].) In *Gertz* v. *Robert Welch, Inc., supra,* the court stated (418 U.S. at p. 350 [41 L.Ed.2d at p. 811]): "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." Appellant points out that there was much evidence of appellant's personal humiliation and mental suffering which the trial court fails to acknowledge in its order.

However, in ruling on a motion for a new trial, the trial court may disbelieve witnesses, reweigh evidence, and draw reasonable inferences that are contrary to those drawn by the jury. Where, as here, the trial court's reasons find *any* substantial support in the record, it cannot be said that the trial court abused its discretion in granting a new trial. (*Hale* v. *Farmers Ins. Exch., supra,* 42 Cal.App.3d 681, 692-693; *Thompson* v. *John Strona & Sons* (1970) 5 Cal. App.3d 705, 709 [85 Cal.Rptr. 350]; See *Jones* v. *Citrus Motors Ontario, Inc., supra,* 8 Cal.3d 706, 710-711). Therefore, the order granting respondents a new trial on the ground of excessive damages must be affirmed. The trial court did not limit the new trial to the issue of damages; therefore, all fact issues have been set at large. (Cf. *Collins* v. *Lucky Markets, Inc.* (1969) 274 Cal.App.2d 645, 649 [79 Cal.Rptr. 454].)

The judgment notwithstanding the verdict is reversed. The order granting a new trial is affirmed. The precautionary appeal from the judgment on the verdict is dismissed as moot. Plaintiff will recover costs on appeal.

Rattigan, Acting P. J., and Emerson, J.,* concurred.

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*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B

TRIAL COURT ORDERS

IN THE

Superior Court of the State of California

IN AND FOR THE

City and County of San Francisco

DEPARTMENT EXTRA-SESSION NUMBER TWO

DONALD WIDENER, *Plaintiff,* vs. PACIFIC GAS AND ELECTRIC COMPANY, a corporation, and JAMES C. CARROLL, *Defendants.*	No. 641292 ORDER FOR JUDGMENT NOTWITHSTANDING THE VERDICT
JAMES C. CARROLL, *Cross-Complainant,* vs. DONALD WIDENER, *Cross-Defendant.*	ORDER CONDITIONALLY GRANTING NEW TRIAL ORDER GRANTING NEW TRIAL ON CROSS-COMPLAINT

The motions of defendants James C. Carroll and Pacific Gas and Electric Company, a corporation, for (1) an order for judgment notwithstanding the verdict; (2) a new trial; and (3) motion of defendant and cross-complainant James C. Caroll for a new trial on the issues joined on the cross-complaint came on for hearing before me on January 2, 1976.

Garry, Dreyfus, McTernan, Brotsky, Herndon & Pesonen, Attorneys at Law, by David E. Pesonen, Esquire, appeared for plaintiff and cross-defendant. Charles T. Van Deusen,

Esquire, Arthur L. Hillman, Esquire, F. Ronald Laupheimer, Esquire, and Crosby, Heafey, Roach & May, Attorneys at Law, by Charles W. Denny, Esquire, appeared for defendant and cross-complainant. The court being fully advised herein and good cause appearing therefor,

IT IS ORDERED:

1. That the motion for judgment notwithstanding the verdict be and the same is hereby granted;

2. That the verdict heretofore rendered on November 10, 1975 be and the same is hereby vacated and set aside; and

3. That the judgment heretofore entered on the 11th day of November, 1975 is vacated and set aside.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff take nothing by his said complaint and that defendants James C. Carroll and Pacific Gas and Electric Company, a corporation, have and recover their costs incurred herein.

This order is granted on the ground of insufficiency of the evidence to justify the verdict. The specification of the reason for this order is as follows:

This is a libel action brought by plaintiff against these moving defendants based on a letter of complaint published by defendants on July 13, 1971 to KNBC-TV regarding the television film, "Powers That Be." Plaintiff Donald Widener was the creator, writer, producer and editor of the film. The subject matter of the film deals with nuclear power, a subject of great public interest and controversy.

An examination of all the evidence in this case, indulging all reasonable inferences to be drawn therefrom in plaintiff's favor, resolving all questions of credibility in favor of plaintiff, there is some evidence from which one might conclude that, in light of after acquired knowledge and infor-

mation, defendant's letter of complaint proved to be untrue, in part. However, there is no evidence that the aforesaid letter of complaint, when published, was known by said defendants or either of them to have been false or that said letter was published with reckless disregard as to whether the letter was true or false by defendants or either of them. Plaintiff failed to produce any evidence of "actual malice" as required under the ruling of *New York Times* v. *Sullivan* (1964) 376 U.S. 254.

For the foregoing reasons the court finds the evidence is insufficient to justify a verdict in favor of plaintiff.

ORDER CONDITIONALLY GRANTING MOTION FOR A NEW TRIAL

In the event that, for any reason, the aforesaid order for judgment notwithstanding the verdict is reversed on appeal then the motion of defendants James C. Carroll and Pacific Gas and Electric Company, a corporation, for a new trial is hereby granted upon the following grounds and for the following reasons:

1. **The Evidence is Insufficient to Justify the Verdict:**

This is an action for damages for an alleged libel of plaintiff Donald Widener by defendants James C. Carroll and Pacific Gas and Electric Company. The weight of the evidence shows that plaintiff is the creator, writer, producer and editor of a documentary film for television entitled "Powers That Be." The film deals with certain aspects of nuclear energy, a subject of great public interest and controversy. In the production of this film plaintiff, at his request, was granted full opportunity to take pictures at defendant's Humboldt Bay Power Plant. There plaintiff interviewed defendant Carroll, a licensed and experienced nuclear engineer both before the filming and again on camera. In so doing, plaintiff intentionally and deliberately

conducted the interview, the filming and the editing of the documentary film so as to grossly misrepresent Carroll, suggesting that he was evasive and unwilling to answer questions concerning early fuel cladding material used in the Humboldt Bay nuclear power plant which had resulted in unsafe conditions. These conditions had long since been corrected.

The film was telecast over the facilities of KNBC-TV, Los Angeles, California. A friend who had seen the film reported to Carroll that as edited he, Carroll was portrayed in a bad light. Carroll, who had not seen the film; was denied an opportunity to review it but was furnished a transcript of same. In a letter dated July 13, 1971 to KNBC-TV, the broadcaster of the film, defendants Carroll and Pacific Gas and Electric Company demanded an investigation and correction. It is this letter that is the basis of plaintiff's action for damages for an alleged libel.

The weight of the evidence shows that plaintiff, as the author and producer of this documentary film, was a public figure. In this action plaintiff had the burden of proving actual malice not only by a preponderance of the evidence but by clear and convincing proof that at the time of the publication of the letter dated July 13, 1971 defendants Carroll and Pacific Gas and Electric Company had knowledge of its falsity or acted in reckless disregard of its truth or falsity.

After weighing the evidence the court is convinced from the entire record, including reasonable inferences to be drawn therefrom, that neither Carroll nor Pacific Gas and Electric Company knew, when the same was published, that any part of the letter dated July 13, 1971 was untrue; that neither of said defendants published said letter with reckless disregard as to whether the same was true or false. On the contrary, the evidence shows that at the time of the publication of said letter said defendants and each of them

believed the letter to be true. The weight of the evidence, therefore, is insufficient to justify a verdict in favor of plaintiff and against defendants, or either of them.

2. **Excessive Damages:**

In this action the jury awarded plaintiff a verdict of $750,000 general damages and $7,000,000 punitive damages.

Except for copies sent to members of Congress, which were absolutely privileged, only the original and four copies of the July 13, 1971 letter were mailed and to be considered by the jury. There is no evidence that any of the recipients of said letter republished same. The original of the letter was sent to KNBC-TV, Los Angeles. Mr. Howard, its General Manager, testified that the letter did not affect plaintiff's relationship with National Broadcasting Company. None of the other recipients of the letter was connected in any way with the television industry.

Plaintiff has failed to establish by a preponderance of the evidence any causal connection between the publication of the letter and his fluctuating income.

The court is convinced that the award in this case was based on factors other than on any evidence which would indicate general or punitive damages sustained by plaintiff proximately resulting from said published letter.

After weighing the evidence the court is convinced from the entire record, including all reasonable inferences to be drawn therefrom, that plaintiff has not suffered any loss or damage, general or punitive, by reason of the publication of the aforesaid letter.

ORDER GRANTING MOTION FOR NEW TRIAL ON CROSS-COMPLAINT

The motion for a new trial made by defendant and cross-complainant Carroll against plaintiff and cross-defendant Widener is granted on the ground of insufficiency of the evidence to justify the verdict.

The jury rendered its verdict that cross-complainant Carroll take nothing by his cross-complaint against plaintiff and cross-defendant Widener. The weight of the evidence shows that cross-defendant Widener, when interviewing cross-complainant Carroll in the production of the film "Powers That Be," intentionally and deliberately so conducted himself as to grossly misrepresent Carroll and thereby inflict upon him intentional emotional distress. The weight of the evidence, therefore, is insufficient to justify a verdict in favor of the cross-defendant on said cross-complaint.

A new trial on said cross-complaint is granted.

DATED: January 9, 1976.

BYRON ARNOLD

Byron Arnold
Judge of the Superior Court

IN THE

Superior Court of the State of California

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

DEPARTMENT EXTRA-SESSION NUMBER TWO

DONALD WIDENER,

Plaintiff,

vs.

PACIFIC GAS AND ELECTRIC COMPANY, a corporation, and JAMES C. CARROLL,

Defendants.

No. 641292

AMPLIFICATION OF ORDERS OF JANUARY 9, 1976

JAMES C. CARROLL,

Cross-Complainant,

vs.

DONALD WIDENER,

Cross-Defendant.

On the 9th day of January, 1976 the Court made and entered its Orders herein as follows: (1) The motion of defendants James C. Carroll and Pacific Gas and Electric Company, a corporation, for judgment notwithstanding the verdict was granted; (2) The motion of defendants James C. Carroll and Pacific Gas and Electric Company, a corporation, for a new trial was conditionally granted; and (3) The motion of defendant and cross-complainant James C. Carroll for a new trial on the cross-complaint was granted.

AMPLIFICATION OF SPECIFICATIONS AND REASONS FOR GRANTING MOTION FOR NEW TRIAL

The Court now amplifies the specifications and reasons for the granting of the motion for a new trial in the action brought by plaintiff Widener against defendants Pacific Gas and Electric Company and James C. Carroll.

The evidence shows, and the Court finds, that before writing the letter of complaint dated July 13, 1971 Carroll recalled the subject matter of the February 10, 1971 interview with Widener, both before and during the filming of "Powers That Be." He also reviewed a transcript received from KNBC-TV. He reviewed a memorandum he had made on February 14, 1971 relating to the February 10 interview with Widener. Carroll also talked to Draeger, Ramsey and Weeks, fellow Pacific Gas and Electric Company employees. Carroll let them see the letter and check its contents for accuracy before the letter was mailed.

The evidence shows, and the Court finds, that when the letter dated July 13, 1971 was posted both Carroll and Pacific Gas and Electric Company believed the contents thereof to be true. Neither Carroll nor Pacific Gas and Electric Company had the slightest suspicion that said letter or any portion thereof was false when the same was written or posted.

After weighing the evidence the Court is convinced from the entire record, including all reasonable inferences to be drawn therefrom, that the evidence is insufficient to support the verdict and, in the interests of justice, a new trial should be and is hereby ordered:

AMPLIFICATION OF SPECIFICATION OF REASONS FOR GRANTING MOTION FOR NEW TRIAL ON CROSS-COMPLAINT

The evidence shows, and the Court finds, that cross-complainant Carroll, a licensed nuclear engineer with Pacific Gas and Electric Company, went to the Humboldt Bay Power Plant for the express purpose of answering in full any of cross-defendant Widener's questions about the power plant; that on two separate occasions prior to the filmed interview Widener asked a question concerning criticism of the early fuel cladding material. On each occasion Carroll replied that the question would take 5 to 10 minutes to answer accurately and completely; that Widener said he did not have that much time to permit such an answer; that Carroll rightfully concluded that was the end of the matter. Later, while on camera, without forewarning Carroll the foregoing question would be asked, Widener asked the same question in a filmed interview. Carroll responded that the criticisms of using improper construction materials in the early stages of construction (which were known by Widener to have been corrected) were analogous to an early problem in the construction of color television sets.

Widener then asked: "What was it exactly that the critics were talking about in your case?"

Carroll responded: "I don't think we ought to answer that. It's too lengthy a question."

Widener asked: "I didn't, I didn't never did hear what he said. What did you say? I never did hear that last part."

Carroll responded: "It's too lengthy a question, I think, to answer."

Widener said: "Oh, okay."

Carroll then said: "Do you want me to spend the ten minutes answering it right? I don't care. I will."

Widener replied: "No, [well or we] we won't—we don't have ten minutes and if you can't answer it in ten minutes, then—"

[Film ends, sound continues]

Widener goes on: "—It can't be done."

It is true that Widener edited the interview and used only the following portion in the final film:

"*J. Lemmon:* This reactor in Northern California has been operating since the 1950's. But not without criticism. Such as faulty fuel rods, a problem since corrected. We asked P. G. and E.'s James C. Carroll about such criticisms.

"*D. Widener:* Mr. Carroll, as you know, there have been published criticisms of the plant here for using imporper [sic] construction materials in the beginning. Can you describe what that's all about?

"*J. Carroll:* Well, this is analogous to a problem you have in your industry. There were criticisms of improper design and construction techniques in early color television sets that resulted in excessive radiation to people.

"*D. Widener:* What was it exactly that the critics were talking about in your case?

"*J. Carroll:* I don't think we ought to answer that, it's too lengthy a question.

"*J. Lemmon:* Long questions. Sometimes short answers. It's tough to get a matched set.

"The questions about nuclear power involve radiation, long-lasting wastes, and the possibility of a major accident. Long questions, indeed."

Widener, in editing the filmed interview, intentionally and deliberately deleted therefrom Carroll's willingness to an-

swer if given the necessary time for a complete answer. Carroll was thus portrayed as being evasive and unwilling to answer Widener's question. The acts and conduct of Widener in so editing the film were grossly misrepresentative and unethical according to expert witnesses Professor Wood and Dr. Hyde.

After weighing the evidence the Court is convinced from the entire record, including reasonable inferences to be drawn therefrom, that by reason of the foregoing acts and conduct of cross-defendant Widener as aforesaid, cross-complainant Carroll was slandered by cross-defendant Widener by and through the film production "Powers That Be." That publication of said film with respect to Carroll was false and misleading; that the slander was uttered with full knowledge that it was untrue and that cross-complainant Carroll was damaged thereby.

By reason of the portrayal of Carroll in the aforesaid film "Powers That Be" the author and writer of same publicized a statement about Carroll that cast Carroll in a severely false light; that the publication was not consented to by Carroll; that the statements concerning Carroll, as published, were done so with actual malice in that Widener knew the same to be false and untrue; that as a proximate result thereof Carroll suffered damage consisting of shame, mortification and hurt feelings; that the conduct of cross-defendant Widener as above set forth was outrageous; that the acts and conduct of Widener were deliberate and intended to and did cause Carroll severe emotional distress and, by reason thereof, said Carroll was caused to and did suffer severe and extreme emotional distress.

After weighing the evidence the Court is convinced from the entire record, including all reasonable inferences to be

drawn therefrom, that the evidence is insufficient to justify the verdict of the jury and that in the interests of justice a new trial should be and is hereby ordered on the cross-complaint.

DATED: January 12, 1976.

BYRON ARNOLD

Byron Arnold
Judge of the Superior Court

APPENDIX C

Order of the California Court of Appeal

Court of Appeal of the State of California

IN AND FOR THE

First Appellate District

DIVISION FOUR

DONALD WIDENER, *Pltf., Cross-Dfdt., Applt. & Rspdt.,* vs. PACIFIC GAS & ELECTRIC COMPANY, etc., et al., *Dfdts., Cross-Complts., Rspdts. and Applts.*	No. 40240

BY THE COURT:

The opinion filed in the above entitled case on November 1, 1977, is revised as follows:

On page 12, strike the first full paragraph and the Xeroxed letter beginning "Dear Maggie:" and ending "Assistant to the President" which continue onto the following page. In its place, substitute the following:

On July 28, 1971, additional copies of Carroll's July 13 letter were sent by Ralph B. Dewey, PG&E's Washington representative, to several members of Congress and to members of the Federal Communications Commission. As the jury was instructed, the letters sent to members of Congress and officials of the Federal Communications Commission were "absolutely privileged and no liability of the [respondents] could result therefrom." The letters were apparently received only for the purpose of showing the general context of other pertinent communications.

On Page 34, continue the paragraph before the last full paragraph as follows:

The trial court did not limit the new trial to the issue of damages; therefore, all fact issues have been set at large. (Cf. Collins v. Lucky Markets, Inc. (1969) 274 Cal.App.2d 645, 649.)

The petitions for rehearing are denied.

Dated: November 28, 1977

RATTIGAN

Acting P.J.

APPENDIX D

Order of the California Supreme Court

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 4, Civil No. 40240

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WIDENER, *Plaintiff, Cross-Defendant, Appellant and Respondent*

v.

PACIFIC GAS AND ELECTRIC COMPANY, etc., et al., *Defendants, Cross-Complainants, Respondents and Appellants*

Petitions for hearing DENIED.

BIRD

Chief Justice

Provisions of United States Constitution

APPENDIX E

AMENDMENT I of the United States Constitution provides in part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

AMENDMENT XIV of the United States Constitution provides in part:

"Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1478

PACIFIC GAS AND ELECTRIC COMPANY
and JAMES C. CARROLL,
Petitioners,

vs.

DONALD WIDENER,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Donald Widener ("Widener") opposes the petition of Pacific Gas and Electric Company ("PG&E") and James C. Carroll ("Carroll") for a writ of certiorari to the California Court of Appeal, First Appellate District, Division Four ("Court of Appeal"), filed on April 18, 1978.

Pursuant to Rule 40 (3), this response omits separate reference to the opinions and orders below and the constitutional provision involved and incorporates the pertinent Appendices of the Petition (Pet. App. .....).

JURISDICTION

The decision of the Court of Appeal is not a final judgment under 28 U.S.C. § 1257. The matter has been remanded by the Court of Appeal for retrial in which "all fact issues have been set at large." (Pet. App.A., 29a).[1]

QUESTIONS PRESENTED

1. Does the petition, seeking review of an interlocutory judgment of a state court not involving the news media, bring this case within the narrow exception to the finality requirement of 28 U.S.C. § 1257, fashioned by this Court in *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975)?

2. When the jury has been properly instructed on the standard of liability under *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), is a defamation plaintiff nevertheless constitutionally restricted in proving "actual malice" to extracting an admission of subjective fault?

3. May the trier of fact draw the inference of a non-media defamation defendant's "actual malice" from a broad range of circumstantial evidence suggesting a motive to lie, notice of the need to investigate truth, and an indifferent investigation of the truth or falsity of the defamatory matter?

4. Is a state appellate court compelled by the United States Constitution to undertake an independent fact-finding role in all defamation appeals, even though the petitioner concedes that the jury was properly instructed?

5. Upon uncontradicted admissions of falsity is there an appellate obligation to find that the defamatory matter is substantially correct?

[1]The San Francisco Superior Court has set the matter for trial setting conference on July 27, 1978.

ADDITIONS TO STATEMENT OF THE CASE

Widener was an award-winning producer of television documentaries employed by station KNBC-TV, an owned-affiliate of the National Broadcasting Company. During the pre-interview conferences with Carroll he became convinced that Carroll was trying to prevent discussion of serious problems affecting public safety in the operation of PG&E's Humboldt nuclear plant. Widener, exercising editorial judgment, portrayed Carroll as evasive in the finished documentary.

Upon learning that the documentary had been broadcast and favorably reviewed in the *Los Angeles Times,* PG&E and Carroll launched a sophisticated campaign to intimidate the network into withdrawing the film from circulation. The charge of surreptitious taping and dubbing leveled at Widener was the centerpiece of this strategy. PG&E played on the anxiety of the major networks during the contemporaneous Congressional investigation of CBS' "Selling of the Pentagon," which allegedly involved surreptitious taping and dubbing of interview material from Defense Department officials.

PG&E's official in charge of public relations on the company's nuclear projects urged his superiors to authorize Carroll's letter of July 13, 1971 because it *"could be most effective in preventing this highly biased program from ever appearing on the air again —or, at least, causing the section referring to us to be wiped out."* (Pet. App.A., p. 9a, emphasis by the Court of Appeal). The petition does not disclose the date of this letter and characterizes it as merely a "letter of complaint." (Pet., p. 5).

The final letter charging that Widener had surreptitiously taped an off-camera discussion and dubbed it into the finished documentary was widely circulated by PG&E to numerous government officials, utility and nuclear industry trade associations, and advertising agencies who dealt with the networks in New York (Pet. App.A., p. 11a).

None of the PG&E officials responsible for sending the letter had seen the documentary. When a sufficiently intimidating effect had been worked on NBC, PG&E's Assistant to the President and chief lobbyist in Washington, D.C., confided that while Carroll's charge against Widener was "off base," *"the fact that NBC is upset at our aggressive approach is just what we wanted."* (Pet. App.A., p. 13a, emphasis by the Court of Appeal).

According to PG&E, Carroll was the only source relied upon for the truth of the surreptitious taping charge. The petition is incorrect in asserting that there was no evidence introduced that would have caused PG&E to doubt Carroll's veracity (Pet., p. 5).

The PG&E officials responsible for the letter knew that Carroll, their only source, was angry and upset and was not reliable (Pet. App. A., p. 18a); they knew that the charge against Widener was devastatingly defamatory in the television industry (Pet. App.A., pp. 11a-11b); and they knew that Carroll's charge was highly improbable (Pet. App.A., p. 18a). This was proper circumstantial evidence on which the jury could disbelieve PG&E's self-serving claim that it had no reason to doubt the truth of the charge or to consider Carroll unworthy of belief.

As the Court of Appeal concluded, after "an independent review of the evidence," Widener introduced clear and convincing evidence from which the jury could conclude that petitioner's—

> motive to suppress the film so overwhelmed its attention that all of its agents, who were in a position to control sending the letter, treated the question of truth or falsity as a matter of total indifference. (Pet. App.A., pp. 19a-19b).

THE CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT

1. THE ISSUE FOR THE TRIER OF FACT TURNS ON CREDIBILITY AND DOES NOT RAISE CONSTITUTIONAL QUESTIONS OF EVIDENCE.

Over the vigorous dissent of Mr. Justice Rehnquist, this Court granted review in *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469 (1975) on finding that the Supreme Court of Georgia had definitively resolved the constitutionality of a state statute imposing

criminal liability on the news media for publication of truthful matter of public interest obtained from public records. A narrow exception to the finality requirement of 28 U.S.C. § 1257 was fashioned in *Cox*, despite a pending retrial, because the chilling effect of the state rule "would make it very difficult for the media to inform citizens about the public business and yet stay within the law." (420 U.S. at 497).

The present petition asks this Court to extend the *Cox* exception to protect the public relations department of a private monopoly from having its credibility tested before a jury on the issue of indifference to the truth in a defamation case.

Such an exception would swallow up the finality requirement in every case colorably raising a First Amendment defense. Petitioners' suggestion of jurisdiction is incorrect. (Cf. *National Broadcasting Co. v. Niemi,* 46 U.S.L.Wk. 3602 (Mar. 28, 1978), *cert. den.* Apr. 24, 1978 (46 U.S.L.Wk. .....).

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2. ON THE MERITS THE WRIT IS INAPPROPRIATE

This Court has said that proof of "actual malice" turns on the "specific facts" of each case. *Time, Inc. v. Pape,* 401 U.S. 279, 292, (1971). Whether the evidence at trial constitutes such proof is a question "for the jury . . . to determine." *Time, Inc. v. Hill,* 385 U.S. 374, 394, n. 11 (1967). The evidentiary boundaries must be "marked out through case-by-case adjudication." *St. Amant v. Thompson,* 390 U.S. 727, 730 (1968).

The "patchwork of largely unarticulated evidentiary standards" (Pet., p. 9) which petitioners ask this Court to survey on review of this case is merely the common law process at work in the rules of evidence throughout the state and federal courts. The Constitution does not condemn this evolutionary fabric woven throughout our system of law.

Whether the press will be deterred and the free flow of information imperiled by discovery of thought and opinion in the editorial room [the question presented in *Herbert v. Lando, cert. granted,* 46 U.S.L.Wk. 3577 (March 20, 1978) (No. 77-1105)] plainly is not involved in this case. Petitioners' contention that this case "touches" on this question is transparently a bootstrap.

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3. THE ALLEGED CONFLICT AMONG THE CIRCUITS IS INAPPLICABLE AND ILLUSORY.

This is not a circuit court case within the meaning of Rule 19(b).

In any event, *de novo* appellate review in defamation matters has occurred only when (a) the trier of fact has applied an erroneous constitutional standard *and* (b) the news media remain threatened with serious liability by the lower court's erroneous resolution of the constitutional question (See *Maheu v. Hughes Tool Co.,* 569 F.2d 459, 464-5 (9th Cir., 1977)). The petition does not bring this case under *either* test.

4. THE RECORD IN THIS CASE DOES NOT LEND ITSELF TO ANNOUNCING A NEW EVIDENTIARY RULE RESPECTING THE TRUTH OF THE DEFAMATORY PUBLICATION.

By uncontradicted admissions of petitioners' witnesses at trial, the charge of surreptitious taping and dubbing, admitted to be false (Pet., App.A., pp. 10a-11a), was the "main point" and essential thrust of the defamatory letter (Pet., App.A., pp. 9a-10a). The Assistant to the President of PG&E, whose understanding was derived only from the letter itself, paraphrased it as charging—

> "use, over the air, of a tape-recording of *pre-interview* discussions between an NBC reporter and one of our senior engineers, Mr. J. C. Carroll. This recording was made without the knowledge of Mr. Carroll. To add insult, the actual interview which was later taped openly, was not used in any way in the 'documentary' TV film . . ." (Trial Exhibits 5, 6, 20; *original emphasis*).

On this and other evidence, the Court of Appeal found the defamation false in all essentials—as did the jury, properly instructed on truth as a defense.

CONCLUSION

Respondent has been forced to wait seven years to vindicate his reputation. The Court should promptly deny the petition this Term to avoid further delay in taking the matter to trial for a second time.

Dated, May 1, 1978

Respectfully submitted,
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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Pursuant to Rule 24 Subdivisions 4 and 5, U.S.S.C. Rules, Petitioners respectfully submit this reply brief in response to the arguments in Respondent's brief that the Petition should be denied because the case is not appropriate for review by this Court.

The clarity of the record in this case is apparent from the fact that no essential fact relied upon by Petitioners is questioned by the Respondent. The only disagreement even suggested relates to Carroll's reliability. (Response to Petition at 4-5.) Analysis reveals that, even here, the parties are in agreement.

Petitioners rely on the fact that everyone at PGandE trusted Carroll. Respondent relies upon evidence which would permit an inference, according to the Court of Appeal,

that they should not have. These two propositions are not contradictory. These differing views highlight the objective nature of the test applied by the Court of Appeal.

Not surprisingly, the parties attach different legal significance to the established facts. For example, Widener asserts that reckless disregard of the truth can be inferred from the admitted fact that no PGandE employee involved saw the film before Carroll mailed his letter. Petitioners assert that the fact, also admitted, that they attempted to obtain a copy of the film before the letter was written and were denied access to it provides evidence of their good faith attempt to write an accurate letter.

Similarly, the opposition to the Petition stresses Petitioners' desire to prevent further showings of the film "Powers That Be." (Response to Petition at 3-4.) This, however, was the logical outgrowth of their belief that the film was distorted and misrepresentative. It is difficult to imagine how a desire to prevent dissemination of a misleading film provides evidence of knowing falsity or reckless disregard of the truth.

The important point that emerges is that the essential facts in this record are undisputed. The critical question squarely presented to this Court is what legal significance may permissibly be attached to these facts in a First Amendment libel case.

Widener begins his argument against the Petition on the basis of a narrow reading of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), suggesting that interlocutory judgments involving the "media" are somehow more final than similar interlocutory judgments involving private parties and non-media corporations. Finality of a judgment is not dependent on the presence or absence of a "media" defendant. Rather, the operative concern should be the importance of the values protected by the First Amendment, whose protection is equally available to "media" and non-

media defendants. *First National Bank of Boston* v. *Bellotti*, 46 U.S.L.W. 4371 (April 26, 1978) (76-1172).

It remains undisputed that the Court of Appeal's opinion establishes with finality the First Amendment standards for the retrial of this case and for any other case relying on the *Widener* opinion. This case will, therefore, have a substantial impact on fundamentally important federal policies related to the First Amendment.[1]

Widener does not contest that the flexibility permitted under this Court's previous decisions to allow the evidentiary boundaries of reckless disregard of the truth to be "marked out through case-by-case adjudication" has resulted in varying degrees of First Amendment protection from trial court to trial court across the country. Rather, Widener simply suggests that the inconsistency in this important constitutional area is a necessary concomitant of the common law process. (Response to Petition at 7.)

The goal of the common law process has been and should be to achieve uniformity while preserving the flexibility to deal with new factual situations. One disadvantage of the common law, however, is that it only works retrospectively on factual situations that have already occurred. This inevitably has a chilling effect on free expression.

In this area there has been enough lower court experience to provide a basis at least to decide whether reckless disregard of the truth is "only negligence raised to a higher power" as well as broader questions of relevance and weight of evidence. There is no need to continue the patterns of inconsistency that have developed in the application of the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

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[1]Widener's reliance on *National Broadcasting Co.* v. *Niemi, cert. denied*, 46 U.S.L.W. 3659 (April 24, 1978) for a contrary position is misplaced since even Mr. Justice Rehnquist, who dissented in *Cox Broadcasting Corp.* v. *Cohn*, was "prepared to assume that the *Niemi* case represented a "final judgment" under the *Cox* holding. *National Broadcasting Co. v. Niemi*, 98 S.Ct. 705 (1978) (Denial of Application for Stay).

To address these evidentiary standards at this particular time is especially appropriate since the question of alternative sources of evidence available to prove reckless disregard will be relevant, at least indirectly, to the discovery issues presented in *Herbert* v. *Lando, cert. granted,* 46 U.S.L.W. 3577 (March 20, 1978) (No. 77-1105).

Widener suggests that all of the decisions discussing the appropriate function of an appellate court in reviewing a defamation judgment under the First Amendment can be harmonized. (Response to Petition at 7.) The cases do not permit such a simple resolution of the conflict in the circuits. Even more importantly, Widener cannot suggest that the appropriate function of a reviewing court is not a matter of extreme importance, or that clarification by this Court would not be of substantial assistance to the lower courts in both the federal and state systems.

Finally, Widener contends that the "main point" of the Carroll letter related to secret taping, and that it is now admitted that no "secret taping" took place. He does not address the question of whether the difference between the admittedly false statement and the actual truth of misrepresentation is sufficient to warrant the imposition of liability consistent with the First Amendment. This is the question which was reserved in *New York Times Co.* v. *Sullivan,* and the question which is squarely posed by this record.

CONCLUSION

It is true that the litigation in this case and in many other First Amendment libel cases has been protracted. However, this impediment to the administration of justice can best be dealt with not by now rushing to judgment in this particular case, but by developing clear guidelines upon which all parties can rely, both in this action and in other defamation actions brought under the First Amendment. This case and other First Amendment libel actions will ultimately be resolved more expeditiously if the proper role for "evidence of negligence, of motive and of intent," whether cumulated or not, is addressed by this Court.

Respectfully submitted,

/s/ JOHN E. CARNE

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May 5, 1978